IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

MFA.No. 776 of 2001(D)

(ORDER IN OS 122/95 OF THE FAMILY COURT,KOLLAM)

APPELLANT:

Vijayan, S/o. Nanu, aged about 62 years,Pandakonathu Veedu, Ambalakaramuri, Valakam Village.

BY ADV. SHRI A.JAYASANKAR
SHRI. MANU GOVIND

RESPONDENTS:
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1. SOBHANA, W/O. ASOKAN, AGED ABOUT 32 YEARS, CHAVARUTHUNDI VEEDU, PANAVELIMURI,VETTIKAVALA VILLAGE, KOTTARAKKARA.

2. ASSALA A. SOBIN, MINOR AGED ABOUT 12 YEARS REPRESENTED BY HER NATURAL GUARDIAN THE 1ST RESPONDENT.

3. ASSMI A. SOBIN,MINOR AGED ABOUT 10 YEARS,REPRESENTED BY HER NATURAL GUARDIAN THE 1ST RESPONDENT.

BOTH RESIDING AT CHAVARUTHUNDI VEEDU,PANAVELIMURI, VETTIKAVALA VILLAGE,KOTTARAKKARA.

4. ASOKAN, AGED ABOUT 39 YEARS,S/O.SANKARAN,CHARUVILA PUTHENVEEDU,AMBALAKARAMURI,UMANNOOR VILLAGE, KOTTARAKKARA TALUK.

BY ADV. SRI.V.N.ACHUTHA KURUP (SR.) FOR R1 TO R3
SRI.B.S.SWATHI KUMAR

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 8/02/2007, THE COURT ON 14/2/2007 DELIVERED THE FOLLOWING:

Order on CMP 6436/01 in MFA 776/01

Dismissed.

Sd/- K.A.Abdul Gafoor,Judge.

Sd/- Antony Dominic, Judge.

14/2/2007

K.A.Abdul Gafoor & Antony Dominic, JJ.
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M.F.A.No.776 of 2001
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Dated this the day of February, 2007.

JUDGMENT

Antony Dominic,J.

The second defendant in O.S.No.122 of 1995 on the file of the Family Court, Kollam is the appellant. Brief facts that are necessary for the disposal of this appeal alone are noted. It is stated that the first respondent herein was married to the fourth respondent and the marriage was solemnised on 25.1.1981. In their wedlock, the first respondent gave birth to respondents 2 and 3,who were minors at the time when the suit was instituted. For various reasons, respondents 1 and 2 could not live together and they are separately living since 31.3.1989 with the children living with the mother. It is stated that by Ext.B3 dated 12.6.1989 the plaint schedule property which belonged to the fourth respondent was purchased by the appellant, who was the second defendant in the suit, for valid consideration. In 1995 respondents 1 to 3, the wife and children of the fourth respondent filed the suit before the Family Court, Kollam praying for maintenance charged on the plaint schedule property along with interest and costs.

2. The suit was contested by the appellant with the fourth respondent remaining ex parte. By judgment and decree dated 20.1.2001, the Family Court decreed the suit allowing respondents 1 to 3 to realise maintenance at the rate of Rs.400/- for the wife and Rs.300/- each for the children from the fourth respondent – husband and charged upon the plaint schedule property and from the estates of the fourth respondent. The plaintiffs were also held to be entitled to the cost of the suit from the defendants. Aggrieved by the above, the second defendant in the suit, the purchaser of the plaint schedule property, has come up in appeal.

3. We heard counsel for the appellant and respondents 1 to 3. In this Court also, the fourth respondent remained ex parte despite the service of notice on him.

4. Obviously, the entitlement of respondents 1 to 3 before the Family Court was asserted based on Section 28 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred as 'Act 1956') and Section 39 of the Transfer of Property Act, 1882 (hereinafter referred as 'T.P.Act'). Section 28 of Act, 1956 provides as follows:

> "Where a dependent has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right".

A bare reading of the Section would show that the benefit of the Section is available only to a dependent, who has a right to receive maintenance out of an estate. Section 28 of Act, 1956 occurs in Chapter III of the Act and Section 21 of Act 1956 defines dependents for the purposes of Chapter III. On a reading of Section 21 of Act 1956, it is to be noticed that the categories enumerated as dependents in the Section do not include wife or children. Since wife and children are not included among the various categories of dependents, they cannot claim the benefit of Section 28 of Act 1956. Therefore, the plaintiffs in the suit being the wife and children of the fourth respondent, they are not entitled to invoke Section 28 of Act 1956 and raise the claim on that basis.

5. What remains to be considered is the effect of Section 39 of the T.P. Act, which is extracted below for reference:

> "Where a third person has a right to receive maintenance, or a provision for advancement or marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands".

An analysis of Section 39 of the T.P. Act extracted above would show that where a third person has right to receive maintenance from the

profits of immovable property and if such property is transferred, he is entitled to enforce his right against the transferee subject to the other conditions mentioned therein. In so far as the facts of this case is concerned, the wife and the children, who are plaintiffs, are entitled to be included in the category of third person. However, their claim to receive maintenance is only against the fourth respondent. They do not have any right to claim maintenance from the profits of the immovable property held by him. They also have not set up such a case in their pleadings. Unless they have a right to receive maintenance from the profits of the immovable property transferred in favour of the appellant, even if the remaining conditions mentioned in Section 39 of Act 1956 are satisfied, they cannot claim the benefit of Section 39 of Act 1956.

5. It is true that it is the case of respondents 1 to 3 that the transfer of property in favour of the appellant was a sham one as it was not supported by any valid consideration and therefore is gratuitous. Though a reading of the plaint would show that no relief was sought in this respect, the Family Court had raised issue No.2 as follows: " Is not the document in favour of the second defendant sham and void?" Considering this issue, the court has concluded that the transaction is collusive and Ext.B3 is sham and created with a view

to defeat the claim of the plaintiffs. Be that as it may, since the plaintiffs do not satisfy the first limb of Section 39 of the T.P. Act, namely, a right to receive maintenance from the profits of the immovable property, the nature and validity of the transaction is immaterial. Thus, the plaintiffs have not made out a right under Section 39 of the T.P. Act as well.

6. In the aforesaid circumstances, we hold that the plaintiffs claim do not come within the scope of Section 28 of the Hindu Adoptions and Maintenance Act, 1956 or Section 39 of the Transfer of Property Act, 1882. For the aforesaid reasons, we are unable to sustain the judgment of the Family Court, Kollam in O.S.No.122 of 1995 and set aside the same as against the appellant. In view of our findings herein above, the appeal stands allowed and the suit will stand dismissed as against the appellant with no order as to costs.

K.A.Abdul Gaffoor,
Judge.

Antony Dominic,
Judge.

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